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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1909

NORMAN ALFIN, *Petitioner*

v.

INTERNATIONAL LADIES GARMENT WORKERS UNION, AFL-CIO, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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No.

NORMAN ALFIN, *Petitioner*

v.

INTERNATIONAL LADIES GARMENT WORKERS UNION, AFL-CIO, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, Norman J. Alfin, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on January 21, 1974.

OPINIONS BELOW

The opinion and award of the arbitrator, Professor Jay W. Murphy, rendered October 23, 1972, the judgment of the United States District Court for the North-

ern District of Alabama at Anniston filed February 27, 1973, and the opinion of the United States Court of Appeals for the Fifth Circuit are reproduced in the appendix hereto.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on January 21, 1974. A timely Application for Extension of Time was granted by this Court on April 11, 1974, extending the filing deadline until June 20, 1974.

QUESTION PRESENTED

Should the doctrine of separability be extended in federal arbitrations so as to authorize an arbitrator to decide questions of fraud in the inducement of substantive portions of a collective bargaining agreement where the parties have clearly indicated their intention that arbitration be their sole remedy by means of a broadly drawn arbitration provision encompassing all disputes?

STATUTES AND REGULATIONS

The arbitration clause contained in the collective bargaining agreement is as follows:

> ARTICLE XXIX: ADJUSTMENT MACHINERY—COURT ACTION BARRED
>
> 1. Any and all disputes, complaints, controversies, claims or grievances whatsoever between the Union or any employees and the Employer or any person responsible under ARTICLE XXIV, which directly or indirectly arise under, out of, or in connection with or in any manner relate to this agreement or the breach thereof, or the acts, conduct or relations between the parties shall be adjusted as follows:

(a) The Shop Chairlady and the Grievance Committee, with or without a representative of the Union, shall attempt to settle the matter with a representative of the Employer. No adjustment shall be deemed binding on the Union unless approved by an authorized representative thereof.

(b) If they shall fail satisfactorily to dispose of any such dispute, complaint, controversy, claim or grievance, or if for any reason it has not been taken up by them, or if the matter does not lend itself to the foregoing procedure, the matter shall be submitted to arbitration before an arbitrator agreed on by the parties. If the parties cannot agree on an arbitrator within three (3) days, then upon request of either party the Federal Mediation and Conciliation Service shall designate the arbitrator and the arbitration shall be conducted in accordance with its rules. The award or decision of the arbitrator, in addition to granting such other relief as the arbitrator may deem proper, may contain provisions commanding or restraining acts and conduct of the parties. If either party shall default in appearing before the arbitrator, he is empowered nevertheless to take the proof of the party appearing and render an award thereon. Any award or decision of the arbitrator shall be final and binding and shall be enforceable by appropriate proceedings at law or in equity. The taking of the oath by the arbitrator is hereby expressly waived. His fee shall be borne equally by the parties hereto.

(c) The parties agree that any papers, notices or processes to initiate or continue an arbitration hereunder, and all papers, notices or processes in any application to a court to confirm or enforce an arbitration award hereunder, including service of the papers conferring jurisdiction of the parties upon the court, may be served by registered mail directed to the last known address of the Employer or the Union.

2. It is intended and agreed that the procedure herein established for the adjustment of disputes shall be the exclusive means for the determination of all disputes, complaints, controversies, claims or grievances whatsoever, including the arbitrability of any dispute, and including claims based upon any breach of the no-strike, no-stoppage pledges of this agreement or upon any other breach of this agreement. It is intended that this provision shall be interpreted as broadly and inclusively as possible. Neither party shall institute any action or proceeding in a court of law or equity, state or federal, or before an administrative tribunal, other than to compel arbitration, as provided in this agreement, or with respect to the award of an arbitrator. This provision shall be a complete defense to and also ground for a stay of any action or proceeding instituted contrary to this agreement.

3. Any dispute, complaint, controversy, claim or grievance which any employee may have against the Employer may be instituted and processed only by the Union in the manner herein provided. No employee shall have the right individually to institute or process any action or proceeding with reference to any dispute, complaint, controversy, claim or grievance; or to initiate or compel arbitration in the event the Union fails or refuses to proceed with arbitration.

STATEMENT OF THE CASE

During the month of June, 1969, Ashland Industries, Inc. (Ashland) which had been successfully operating a non union dress factory in Ashland, Alabama, entered into a collective bargaining agreement with the International Ladies Garment Workers Union, AFL-CIO, (ILGWU). Admitted and undisputed is the fact of Ashland's reliance on the Union's express promise, through its associate regional director, that Ash-

land would become a "registered shop", assuring it of getting contract work from manufacturers under contract with the Union. Ashland and Alfin agreed to cooperate with the Union's organizational plans and to enter the collective bargaining agreement.

The immediate specific reason that Ashland wished to become "registered" was to enable it to continue to do business with a corporation known as Villager which engaged in the manufacture of clothing through sub-contracts. Ashland began to do business in Alabama in 1967. At the outset approximately one (1/3) third of Ashland's work was for Villager. This grew to two (2/3) thirds, and finally about February 1968 Villager took 100% of Ashland's production. Then in January of 1969, Villager informed Ashland that it had been stopped by the ILGWU from sending work since Ashland was a non-union plant.

In reliance as aforesaid the contract with the Union was signed by Petitioner Norman J. Alfin as president of Ashland and individually. Thereafter, the Union failed to obtain "registered" status as promised, and accordingly, Villager stopped sending work, and finally, in October 1969 Ashland was forced out of business.

The collective bargaining agreement executed by the parties contained (see Appendix) the broadest possible and most inclusive arbitration clause, which specifically *barred* court action. Disregarding this part of the contract, the Union filed suit in the District Court against Ashland and Alfin, individually, claiming various benefits alleged to be due under the collective bargaining contract.

Ashland, impecunious and out of business failed to defend the suit and a default judgment was entered

against Ashland in the amount of $42,000.00. In his Answer, Alfin set out the arbitration procedure of the collective bargaining agreement as an affirmative defense, pointing out those provisions of the paragraph which stated that arbitration shall be the exclusive remedy and tribunal for all disputes. Thereupon, the *Union* moved for summary judgment or to stay the action pending arbitration. On April 11, 1972, the District Court issued an Order staying the case pending arbitration.

After designation of Professor Jay Murphy as arbitrator the arbitration was conducted culminating in a ruling in which the arbitrator found fraud in the inducement of Alfin's personal liability under the collective bargaining agreement and held Alfin not personally and individually bound by the contract because his "agreement to bind himself was expressly conditional upon the representations made to him by Mr. McCoy, a high official of the ILGWU, a signatory of the contract." (award p. 9 appendix).

Afterwards the Union returned to the United States District Court and filed a motion to set aside the award on the grounds that the arbitrator had exceeded his authority. The Court granted the motion on February 27, 1973. Alfin appealed to the United States Court of Appeals for the Fifth Circuit, and on January 21, 1974 that Court ruled, *International Ladies Garment Workers Union, AFL-CIO* v. *Ashland Industries et al.*, —— F.2d ——, (opinion in case No. 73-2017, United States Court of Appeals, Fifth Circuit, January 21, 1974) at p. 337,

> "The arbitrator who derives his power solely from the contract cannot hold that charter to be legally ineffective. (citations omitted)."

Thus, the Court ruled that the proper forum for adjudicating a claim of fraud in the inducement of the collective bargaining agreement is the United States District Court remanding the cause to the District Court for that purpose.

Suit by the union in the United States District Court was filed pursuant to the authority vested in Section 301(a) of the Labor Management Relations Act, 1974, 61 Stat. 156, 29 U.S.C. § 185(a), 29 U.S.C.A. § 185(a)

REASONS FOR GRANTING THE WRIT

The use of arbitration has significantly aided the courts. It has reduced calendar congestion and has removed many protracted matters from the court system. The judgment of the Court of Appeals presents an issue of great importance in the field of labor-management relations, and it would seem to be contrary to the present federal policy of promoting industrial stabilization through the collective bargaining agreement. The most significant way to further this policy is the encouragement of ever broader and less restrictive use of arbitration to resolve with speed and finality all disputes where that remedy is the express choice of the parties. The judgment is philosophically contrary to the recent decisions of this Court [1] and to the deci-

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[1] The "trilogy" cases, United Steelworkers of America v. American Manufacturing Co., 1960, 363 U.S. 554, 80 S.Ct. 1943, 4 L.Ed.2d 1403, United Steelworkers of America v. Enterprise Wheel & Car Corp., 1960, 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424, United Steelworkers of America v. Warrior & Gulf Navigation Co., 1960, 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409, and Prima Paint v. Flood & Conklin, 388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1970).

sion of the highest state court that has recently ruled on the issue.[2] If allowed to stand the ruling will enable a recalcitrant party to cast a gigantic road block in the path of orderly resolution of labor disputes; and it would set back, rather than encourage, the arbitration of such disputes. The judgment of the Court of Appeals presents this Court with a splendid opportunity to extend the philosophy of the trilogy decisions and the Circuit Court seems to be awaiting direction from this Court.

The issue the Court is called upon to decide is quite simple. Should an arbitrator, acting under a broadly drawn arbitration clause of a collective bargaining agreement, be permitted to decide a claim of fraud in the inducement of the contract? If he is not allowed to decide this question, petitioner submits, a claim of fraud in the inducement of the contract by either party will frustrate the intent of the parties to arbitrate and send the dispute back to the decidedly slower, more cumbersome, more time consuming and costly apparatus of the courts, needlessly clogging the overburdened courts with additional litigation.

This Court should declare it is in our national interest to have the speed and finality of arbitration in labor disputes arising under a collective bargaining agreement in which both sides agree to arbitrate all disputes? Petitioner submits it is.

The trilogy decisions of this Court (Supra 1) significantly encouraged arbitration by broadening the area of the arbitrator's jurisdiction while narrowing the area of permissable restraints upon such jurisdic-

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[2] Weinrott v. Carp, 32 N.Y.2d 190, 344 N.Y.S.2d 848.

tion to be exercised by the courts.[3] Clearly the intent of this Court was to foster and promote arbitration. The *Warrior Case* declared that a major factor of the collective bargaining agreement is the inclusion of the arbitration provisions. In a later decision the Court continued its sanguine view of the arbitration procedure, and addressing itself to the very issue of this case,[4] this Court held, *Prima Paint* v. *Flood and Conklin,* 388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1970), that an arbitrator *can* decide a claim of fraud in the inducement of a contract absent a contention of that there was fraud in the inducement of the agreement to arbitrate. The Court quoted Judge Medina's opinion in *Robert Lawrence Co.* v. *Devonshire Fabrics, Inc.* (1959, CA 2 NY) 271 F.2d 402, cert. dismd. 364 U.S. 801, 5 L.Ed.2d 37, 81 S.Ct. 27 stating at 400:

> "a claim of fraud in the inducement of the contract generally—as opposed to the arbitration clause itself—is one for the arbitrators and not for the courts; and that this rule—one of national substantive law—governs even in the face of contrary state rule."

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[3] The instant case differs from the trilogy cases in several basic areas. First, in the trilogy disputes one party was resisting arbitration. In the instant case both parties sought arbitration and neither party claimed any issue was dehors the jurisdiction of the arbitrator. Secondly, the arbitration clause in the present matter is framed in the broadest possible language to include any and all disputes, and it specifically bars court action. Thirdly, none of the trilogy cases involved the question of fraud in the inducement of the contract. In fact, as stated above, the Union moved to stay the court action pending arbitration. Only after the adverse award did the Union raise the issue of jurisdiction.

[4] Is the Court or an arbitrator to resolve a claim of fraud in the inducement of a contract?

Compare the result of *Prima Paint and Robert Lawrence* with the ruling of the Court of Appeals in this case.[5] Which ruling sincerely reflects the intent of the parties? Which result is more desirable? Which more nearly reflects federal policy?

Recently the highly esteemed Court of Appeals of New York (supra 2) adopted the "national substantive law," *Robert Lawrence Co.* (supra) and ruled to allow an arbitrator to decide the issue of fraud in the inducement of the contract, *specifically reversing* its earlier decision which no longer "retained its vitality".

The long discussion by the Court in *Weinrott* emphasized three areas of consideration. First the Court considered the *intent* of the parties and concluded that a broad arbitration agreement reflects a general desire to have all issues resolved with speed and finality. Secondly, the Court suggested that as a *policy* matter the result reached was consistent with the federal result, and desirable. Finally, the Court discussed the *problem* inherent in the claim of fraud in the inducement under the old rule. Even under a broad arbitration clause such a claim will create an issue triable by the courts and it effectively stymies arbitration. In *Weinrott* the arbitration issue was stayed while this preliminary question began its long (five years)

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[5] See also, the recent (1972) ruling, Erving v. Virginia Squires Basketball Club (CA2), 468 F.2d 1064, in which Judge Medina upheld the authority of an arbitrator to rule upon the issue of fraud in the inducement of a contract, citing *Prima Paint*, saying that Federal law governing arbitration "is to be implemented in such a way as to make arbitration effective, and not to erect technical barriers, such as were the mode in early days when arbitration was viewed by many courts with suspicion and hostility."

and tortuous journey through the courts and finally "fell exhausted at the Court of Appeals". The New York decision also discussed and adopted the "separability" argument used in the *Robert Lawrence* case [6] but cautioned against becoming mired in legal technicalities.

The Fifth Circuit Court of Appeals in this matter has, petitioner submits, failed to perceive and join the main stream of the enlightened policy of promoting arbitration. In so doing, it seems to us, the Fifth Circuit was indicating that it was waiting for this Court to lead the way in the federal jurisdiction. The District Court by granting the Union's Motion to Stay arbitration has already decided the question now being remanded to it.

Thus, the Fifth Circuit seems to have allowed to stand in its way of moving to the main stream technical barriers and outdated dogma, and it totally failed to make the proper inquiry, namely, *what is the intent of the parties?* Petitioner submits that the broad arbitration clause in this manner only permits one answer. Certainly when the parties clearly express their intention that arbitration be the remedy to resolve all disputes, and no fraud is claimed in the inducement of the separable arbitration clause itself, an arbitrator must have the necessary latitude to decide the question of fraud in the inducement of substantive portions of an agreement, and this is consistent with the earlier decisions of this Court and with our clearly enunciated federal policy.

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[6] The *Weinrott* opinion states at p. 855, "The technical argument about separability or nonseparability has often obscured the main goal of the courts inquiry which is to discern the parties intent (footnotes omitted)."

CONCLUSION

For the reasons discussed, it is respectfully sub
mitted that a Writ of Certiorari should issue to revie
the decision of the United States Court of Appeals fo
the Fifth Circuit.

Respectfully submitted,

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APPENDIX

OPINION AND AWARD

October 23, 1972

ARBITRATION BETWEEN
ASHLAND INDUSTRIES, INC. AND
NORMAN J. ALFIN, INDIVIDUALLY
and
INTERNATIONAL LADIES' GARMENT WORKERS UNION,
AFL-CIO

Appearances:

George C. Longshore, Attorney, For the Union
Benny Dansavage, Ala. Director ILGWU, For the Union
Denver Sherrer, President Local 390, For the Union
Saram Amerling, Attorney, For the Company
Norman J. Alfin, President Ashland, For the Company
William Minor, Product Manager, For the Company

HEARING

The hearing was held in Mr. Longshore's law offices on August 24, 1972 in Birmingham, Alabama. This is Federal Mediation and Conciliation Arbitration File No. 72A/10341.

FACTS

On April 11, 1972, Chief Judge Seybourn H. Lynne, in Civil Action No. 70-96, made the following order:

"IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, EASTERN DIVISION

Civil Action No. 70-96

INTERNATIONAL LADIES' GARMENT WORKERS UNION,
AFL-CIO, Plaintiff

vs.

ASHLAND INDUSTRIES, INC., a Corporation, and
NORMAN J. ALFIN, Individually, Defendants

ORDER

This cause came on to be heard on the regular motion docket of April 7, 1972, on plaintiff's motion for summary

judgment or in the alternative for a stay pending arbitration.

Upon consideration of such motion and the pleadings on file,

It is ORDERED, ADJUDGED and DECREED by the Court that these proceedings be and the same are hereby stayed pending arbitration of the matters at issue.

Done this 11th day of April, 1972.

SEYBOURN H. LYNNE
Chief Judge

This arbitration grew out of a complaint by the Union filed in the court on February 10, 1972 against the Ashland Industries, Inc., a corporation, and Norman J. Alfin, individually. Service was had on the corporation on May 22, 1970 but not on Mr. Alfin. On July 9, 1970 the Union filed a motion for default judgment against the Corporation. On April 6, 1971 judgment was entered against the corporation by the court in the amount of $42,051.49.

The issue presented by the Union in the arbitration hearing was whether under the contract between the parties dated June 9, 1969, Mr. Norman J. Alfin was personally bound to the Union and employees for all obligations owed to the Union and employees by the Corporation. The position of the Union was that Mr. Alfin was personally bound according to *Article XXIV* of the contract which reads as follows:

"ARTICLE XXIV: NON-PAYMENTS—RESPONSIBILITY

1. Notwithstanding ARTICLES XXVIII and XXIX or any other provision of this agreement, if the Employer fails for five (5) days to pay in full any wages due to the workers covered by this agreement, any dues or other monies due to the Union, and payments due under ARTICLE XVIII, or any payments due towards the Funds as provided in ARTICLE XV, the

Union may immediately direct the workers to discontinue work until all sums due have been paid in full and/or may immediately institute action at law or equity or before an administrative tribunal to obtain payment or such sums. These rights shall be in addition to all other remedies available to the Union.

2. The officers, directors and stockholders of the Employer shall, as individuals as well as in their corporate capacities, be personally liable, jointly and severally, for full compliance with this agreement including the payments above set forth.

3. In the event of any breach of this agreement by the Employer (including any nonpayment by the Employer of sums due to any employees for wages, holiday pay, or otherwise) the Union in its own name shall be a proper party in interest to enforce compliance by the Employer with this agreement on the Union's own behalf and on behalf of any affected employees without further assignments or authorizations from them."

Further evidence of his personal obligation, according to the Union, was Mr. Alfin's signature to the contract, appearing on page 16 of the contract as follows: "By Norman J. Alfin as Pres. of said Employer and also individually."

It is also the position of the Union that this arbitrator has no power to arbitrate the matter of the corporate liability since this matter was settled in a final judgment by the above court.

The position of Mr. Alfin, through his counsel, is that this arbitrator does have power to consider all issues de novo of corporate responsibility and individual responsibility of Mr. Alfin, but, notwithstanding that power, Corporate Counsel Mr. Amerling's position is that Mr. Alfin is not personally liable under the above contract on the ground that he was induced to cooperate with the Union's organization at Ashland, and to make himself individually responsible for all contract obligation through the false

and wrongful misrepresentations of the Associate Regional Director of the International Ladies' Garment Workers Union, relying upon such false and wrongful misrepresentations by the Associate Regional Director, Mr. Rommel McCoy, that the Ashland plant would be made a "registered" plant and Union by the Philadelphia ILGWU, which had a contract with a corporation known as the Villager which was engaged in the manufacture through sub-contracts with other concerns (Ashland being one of some seventy enterprises with which Villager had contracts). The significance of being "registered" was that this status permitted Villager to contract out work freely to plants which met the conditions required by the Philadelphia ILGWU local with which Villager, as stated, had a contract.

The reason why Ashland wished to be "registered" was simply in order to be able to do work for Villager. Ashland began to do business in Alabama toward the end of 1967. At the beginning of 1969 Ashland was a non-union shop. Beginning in 1967 about ⅓ of Ashland's work was for Villager, this grew to ⅔, and finally about February 1968 Villager took 100% of Ashland's production. Then in January 1969, Villager informed Ashland that "They had been stopped by ILGWU from sending work to Ashland since Ashland was a non-union plant."

This led to conversations between Mr. Alfin, as president of Ashland, with Villager and with the ILGWU. The Vice-President of Villager, Mr. Sam Altman and Mr. Herbert Zucker, then in charge of production for Villager, desired to continue the relationship with Ashland. Mr. Altman and Mr. Zucker advised Mr. Alfin that they would arrange a meeting with Mr. McCoy (who as indicated was an executive with ILGWU assigned to the south which included Alabama) in his Atlanta office. Mr. Zucker and Mr. Alfin flew to Atlanta on March 18, 1969. Mr. Alfin testified that at that meeting Mr. McCoy (who did not appear as a witness in this arbitration, but who signed

the above mentioned contract) informed Mr. Zucker that if Ashland would agree to make no objections to the organization of an ILGWU local at Ashland that the Ashland plant would be granted the status of a permanent registered contractor for Villager—and be entitled to continue to receive contracts from Villager. Mr. Zucker testified at the hearing that he was with Mr. McCoy when Mr. McCoy, by telephone, confirmed this understanding with Mr. Ross, who was at the time chief executive officer of ILGWU in Philadelphia which had the contract with Villager and whose consent it was necessary to have in order for Villager to continue its contracts with Ashland.

It was this understanding on which Mr. Alfin stated he relied in agreeing to make himself individually liable under the above Union-Ashland contract signed on June 9, 1969. Mr. Alfin testified that he would not otherwise have proceeded with assistance to the Union in organizing a local at Ashland; that in reliance upon this representation by Mr. Ross, that he, Mr. Alfin, agreed to provisions in the contract which was signed—which provisions were similar to many other contracts to which the ILGWU was a party; the terms later incorporated in the contract were confirmed in a letter of March 19, 1969 (Arbitration Exhibit No. 10) from Mr. Alfin, writing on Ashland Industries, Inc. letterhead, to Mr. McCoy. Following this Mr. McCoy requested that Ashland place on its payroll a lady organizer for ILGWU to assist in the organization of the Union at Ashland. This was done. Prior to this none of the employees of Ashland were members of the ILGWU.

Mr. Alfin testified that pursuant to this understanding he requested his supervisors to abstain from any objections to the organization of the Union, and that Mr. McCoy further asked Mr. Alfin to meet with certain influential townspeople who were concerned about a Union coming to Ashland; that Mr. Alfin did meet with the mayor, who was also the president of the bank, and assured them that

the Union's coming to Ashland would be of benefit to Ashland since this was the only condition under which Ashland could operate with contracts from Villager; that is, Ashland had to receive the "registered" status—meaning in essence approval of the ILGWU of Philadelphia, before Villager would contract with Ashland; and that otherwise Ashland would suffer greatly in its business, and that having a Union would assure that the employees would be gainfully employed on a steady basis. Mr. Alfin testified that he received assurances that leading townspeople would accordingly not interpose objections to the unionization of Ashland.

Following this the local was organized at Ashland and a mutually acceptable third party was agreed upon by Ashland and the Union who counted the cards and agreed or "certified" that the Union had a majority: this was on April 24, 1969. Some employees at Ashland resisted the Union's coming. The second week in May there were meetings held in the Holiday Inn at Ashland where the contract terms, as specified in the above letter, were agreed upon; and on the 3rd week of May Mr. McCoy, together with another officer of ILGWU from Atlanta, addressed the employees on the Company premises—the Company having stopped work and requested that the employees come to listen to these officials.

Mr. Alfin testified that he believed the promises made to him by Mr. McCoy; that he relied on the promises made to him by assisting in the establishment of the Union at Ashland; that if the promises had not been made that he would not have acted as he did; and that he would not have entered into an agreement with the Union; that at the signing of the contract that Mr. Alfin insisted that the contract be between the local and the Southeastern Region of ILGWU, but that Mr. McCoy insisted that Mr. Alfin sign the contract "individually," and that Mr. Alfin signed individually in reliance on the above representations and

that he otherwise would have not signed the contract, either as president of Ashland, or as himself individually.

The sequence of events were that Ashland was not registered as Mr. McCoy promised that it would be, and that accordingly Villager curtailed sending its work to Ashland and finally totally ceased sending any work to Ashland on September 1969; that this "broke" Ashland, according to Mr. Alfin. In contacting Mr. McCoy concerning the non registration of Ashland, Mr. Alfin said he was advised by Mr. McCoy that he (Mr. McCoy was "having difficulties with Mr. Ross, and that Mr. Sherman (a Vice-President of Villager who succeeded Mr. Altman called Mr. Ross and reported that "Mr. Ross told him that he had never had any intention of us (meaning Ashland) becoming a registered shop." The work ceased to be sent by Villager to Ashland. Mr. Ross advised Villager that he did not consider Ashland to be a registered shop "so Villager pulled its work out." Mr. Ross, during this time, was also one of the Vice-Presidents of the parent International ILGWU.

Concerning the payments specified in the contract as required to be made by Ashland to the Union as set out in the contract's Article XV "Benefit Funds" both Mr. Alfin and Mr. Zucker (who presently is Manager of the National Association of Blouse Manufacturers) testified that it is an accepted custom of the industry that corporations like Villager with contracts with ILGWU would make payments to the local union (in Villager's case to the Philadelphia ILGWU union) with the custom and practice that funds were then distributed by the Philadelphia local to the other local unions where the work had been done; that the custom and practice had grown up over the years in order to protect the locals and the employees from "fly by night" garment manufacturers who might otherwise not fulfill their obligations assumed under the contract, or go out of business, and leave the local and the employees

without resources agreed upon in the contract. The provisions of Article XV of the contract are set out below:

"ARTICLE XV: BENEFIT FUNDS

1. The Employer shall pay weekly to the Union a sum equivalent to *nine and one-half* (9½%) per cent of its total gross weekly payroll (before deduction for federal or state taxes) of all the non-supervisory production, maintenance, packing and shipping workers (whether Union or non-union workers and whether regular or trial period workers) employed in any of its own shops. Such payments shall be allocated as follows:

(a) *Seven* (7%) per cent towards the Southeastern Regional ILGWU Health and Welfare Fund, a trust fund established by collective agreement and maintained in trust for the purpose of providing workers with health, welfare, and recreation benefits and services.

(b) *Two* (2%) per cent towards the ILGWU National Retirement Fund, a trust fund established by collective agreement for the purpose of providing pensions or annuities on retirement or death of workers.

(c) *One-half* (½%) towards the Supplementary Unemployment-Severance Benefits Fund, ILGWU, a trust fund established by collective agreement for the purpose of providing workers with supplementary unemployment-severance benefits.

None of the payments made hereunder by the Employer shall constitute or be deemed wages due to the workers.

2. The said Health and Welfare Fund, the said Retirement Fund and the said Supplementary Unemployment-Severance Benefits Fund each shall be administered in accordance with its by-laws or rules and regulations by a Board of Trustees. Each Board of Trustees shall be composed of union representatives and an equal number of representatives of employer contributors to that Fund. In the event that the Board of Trustees shall be deadlocked on any issue or matter arising in connection with its Fund, the same shall be

decided by a neutral person as set forth in the by-laws or rules and regulations of said Fund, and his decision shall be final and binding. The parties hereto hereby ratify, confirm and approve the composition and membership of each Board of Trustees as now or hereafter constituted.

Each Board of Trustees shall adopt and promulgate such by-laws or rules and regulations to effectuate the purpose of its Fund as it may deem necessary and desirable, including the detailed basis upon which payments from the Fund will be made, and shall have the power to modify the same from time to time. The parties hereto agree to be bound thereby and they are hereby incorporated in and made part of this agreement.

An annual audit of each Fund shall be made by accountants designated by its Board of Trustees. A statement of the results of such audit shall be made available for inspection by interested persons at the principal office of the Fund and at such other places as may be designated by its Board of Trustees.

The Employer shall have no legal or equitable right, title, claim or interest in or to said Funds. No individual worker shall have any legal or equitable right, title or interest in, or claim against, his or any other employer's payments toward said Funds or against said Funds, except as may be provided by the by-laws or rules and regulations of said Funds.

None of the monies paid into each of said Funds shall be used for purposes other than those permitted by law, and to pay the operating and administrative expense of such Fund. The monies of each of said Funds shall be kept separate and apart from all other monies.

3. The Board of Trustees of each said Fund is hereby authorized and empowered, in its sole discretion and upon such basis as it deems desirable, to transfer or mingle the assets of said Fund or to merge said Fund with another health and welfare fund or funds, with another retirement fund or funds, or with another supplementary unemployment-severance benefits funds, as the case may be, now or hereafter exist-

ing and established by collective agreement with any unit of the International Ladies' Garment Workers' Union or with the said International itself. In the event of such transfer, mingling or merger, the amounts hereinabove provided to be allocated toward the particular Fund shall thereafter be paid over to the fund or funds with which there has been such transfer, mingling or merger.

4. The Union or the Board of Trustees of the Fund, or either of them, shall be proper parties in interest to enforce collection of payments due from the Employer toward said Fund. In the event any amount due from the Employer under this ARTICLE XV remains unpaid for thirty (30) days after becoming due, such amount shall automatically bear interest thereafter at the rate of six (6%) per cent per annum and the Employer shall pay the same.

The evidence was that there were about fifteen registered shops doing business with Villager at the time, and there were about sixty non-registered shops; that there were three registered shops in the south: the C. J. Manufacturing Company of Miami, the Laura Manufacturing Company of Selma, and the Greg-Harriet Shirt Company of Exemore, Virginia. Mr. Zucker testified that he was advised that the ILGWU was interested in unionizing in non-union areas of the south, which was a reason for Mr. McCoy's agreement to see that Ashland was "registered."

On cross examination Mr. Alfin testified that he was given assurances by the following persons that Ashland would be registered: Mr. Altman, Vice-President in Charge of Production for Villager; by Mr. Robert Sherman also Vice-President of Villager; by Mr. Zucker, then Director of Manufacturing for Villager, and from Mr. McCoy; that he was taken to Mr. McCoy by Mr. Zucker of Villager on the initiative of Villager; that Villager and Mr. McCoy talked to Mr. Ross and that it was their responsibility and that Mr. Alfin never talked to Mr. Ross.

Mr. Zucker testified, as indicated above, that he was present with Mr. McCoy when Mr. McCoy talked on the

telephone from Atlanta with Mr. Ross, that he heard the conversation and heard Mr. McCoy state that he was meeting with Mr. Alfin, and that he (Mr. McCoy) discussed unionization of Ashland with Mr. Ross and that Ashland could be unionized provided it was made a registered shop, and that Mr. McCoy stated that Ashland would be a registered shop and could and would get protection as a registered shop. As a present representative of one hundred different garment manufactures Mr. Zucker testified that the form of the contract signed with the Union and Ashland was substantially the same form used by other locals not only with Villager but also in New York operations, and that the companies like Villager with such contracts would compute the percentage of fringe benefits due each contractor based on work done and forward payments to the Philadelyhia local, and the Union local, as in Philadelphia, would keep a certain amount for administrative costs; that this practice was followed in the industry to better enable the local Unions to collect such fringe benefits; that remittance sheets were sent in every month and the Union would send in auditors to the prime manufacturer (in this instance Villager) to audit the books, and this was the Union's assurance (here the Philadelphia local which had the contract with Villager) that the prime contractor (here Villager would not violate the contract with the local (here Ashland).

DISCUSSION

The foregoing facts are stated in some detail to illustrate the basis of my award that Mr. Alfin's agreement to bind himself individually was expressly conditioned upon the representations made to him by Mr. McCoy, a high official of the ILGWU, a signatory of the contract. Following the initial conversation, reported by both Mr. Alfin and by Mr. Zucker, there were acts done by Mr. Alfin in specific reliance upon Mr. McCoy's promise. This promise was not kept.

In a leading treatise on the law of contracts, volume 3 *Corbin On Contracts (West Publishing Company, 1960, 1971 pocket parts) Section 591* the following appears:

> "A bilateral written contract consists in the exchange of reciprocal written promises. Either or both of these promises may be dependent or independent. One of them is said to be dependent if it is conditional upon the performance or tender of performance of the return promise. Frequently, however, the writing says nothing of such a condition as this. In form, the promise is wholly independent and unconditional. For two centuries or more, after bilateral contracts were recognized, the common law courts held that the reciprocal promises were independent unless they were expressly made conditional. This was later reversed by the courts. Evidence was admitted to show that the parties contemplated an exchange of performances as well as an exchange of promises. The defendant could show that his promise was impliedly conditional on performance of the agreed exchange by the plaintiff. The present writer has seen no case in which the 'parol evidence rule' was held to prevent proof of an oral agreement that the defendant's promise should be thus conditional. Instead, nonperformance by the plaintiff is called 'failure of consideration' and oral proof of such failure is not prevented by the 'parol evidence rule.' The defendant's promise is held to be conditional on performance of the return promise by the plaintiff, even though the writing itself says nothing of such a condition . . ."

In *Section 590 "Proof of Fundamental Assumptions on Which Agreement was Based,* the following is stated by Professor Corbin:

> "It very often happens that when two parties are trying to integrated their agreement in a writing they omit to state some fundamental assumption on the basis of which, as both of them well know, the agreement is being made. The mere existence of the writing should never be held to exclude testimony of such an unstated fundamental assumption. The truth of this assumption—the existence of the fact that is assumed

> —is a condition of the obligation of the written promise; and this is so whether we describe it as a 'constructive' condition os as an 'implied' condition. In reducing the terms of an agreement to writing, parties very frequently leave such gaps as this because they are not wise enough to do otherwise. They put into words their agreement on obviously necessary items, without foresight as to the events of the future, leaving unexpressed some of the fundamental assumptions of which they may be either clearly or only partly conscious. Justice requires the courts with the advantage of hindsight, to fill some of these gaps. Evidence of the facts tending to show that such a fundamental assumption was made, though not expressed in the writing, should never be excluded by any 'parol evidence rule.' "

A review of *Corbin's chapter 26 The "Parol Evidence Rule"*, including sections on fraud and mistake, is unnecessary here to further support the interpretation of the fact situation as revealed by the evidence which establishes convincingly that Mr. Alfin agreed to sign this contract in the form of making himself personally and individually bound by its terms solely based on the representations made to him by an agent of the Union and signatory of the contract who had full power to act in such agency relationship and to make representations on the basis of which Mr. Alfin could rely as a condition to his agreement to bind himself personally and individually. Accordingly, I find that Mr. Alfin is not personally and individually bound by the contract signed by him dated June 9, 1969.

The parties stipulated at the hearing that they would submit to this arbitrator an agreed statement of monies owed the Union and the employees under the contract, and stipulated that I would incorporate such stipulation of agreement in my award. The parties have not submitted such stipulation, and accordingly this award does not include such agreed stipulation.

The only issue presented by the parties in this arbitration was the question of the personal and individual lia-

bility of Mr. Alfin, and that is the only issue decided by this Arbitrator.

The question concerning the effect of the default judgment entered against the corporation by the above mentioned court was not argued or presented in this arbitration proceeding, accordingly this is not within the jurisdiction of this Arbitrator.

CONCLUDING REMARKS

The employees themselves have suffered as a direct result of their own Union officials making promises to the employer that an act fundamental to the existence of the contract would be done (namely: registered status for Ashland), if the employer would cooperate in the establishment of a majority union membership and not exercise its lawful privilege of speaking against a union to the extent that the employer would be entitled to do under the Labor Management Relations Act as amended, and if Mr. Alfin would sign the contract as individually and personally responsible. Their agent, in other words, did the acts, made the promises, on which Mr. Alfin relied, and which acts and promises were not performed, and which according to well established contract law relieves Mr. Alfin of his personal and individual responsibility.

To make the point crystal clear, suppose the shoe was on the other foot. And suppose that it was Mr. Alfin and Ashland which had promised the Union that special benefits would be given to the Union if it came and organized; then after the Union had relied on such promise and had incurred the expense and effort of organization, then if Mr. Alfin and Ashland not only refused to do what they promised to do but SUED the Union officers personally for not continuing their organization (having obtained the personal promise of individual liability from the Union officers, as was done in the case of Mr. Alfin in the present contract) this would be like the situation we are faced with in the question of Mr. Alfin's personal liability.

I have not the slightest doubt but that the Union officials would not be silent in demanding that the arbitration board excuse them from performance, and that the employee-union members would not be silent about the fact that the Union was in the right. I point this out as directly as possible in order that the employees who are one of the losers in this situation will see and understand the situation in which they find themselves. Why the Union officials failed to fulfill their clear and express promises the evidence does not show. The fact is that they did, and for an Arbitrator to ignore this failure would be for him to ignore one of the clearest and most fundamental principles in the law of contracts—in accordance with which the parties necesarily made their agreement.

Concerning the promissory note executed by Mr. Alfin for unpaid wages, Mr. Amerling, Counsel for Mr. Alfin, freely admitted that the note had been given and that Mr. Alfin assumed responsibility for it acknowledging in his reply brief that "Since Mr. Alfin has not disputed or sought to evade his personal responsibility on that note, the only issue would seem to be whether that not was fully paid, as Mr. Alfin claims, and for which he has submitted documentary proof, or remains partially unpaid." This Arbitrator cannot pass on the question of whether or not the above note obligation assumed by Mr. Alfin has been fully paid because there was no evidence presented at the hearing on which to base such a ruling. It was the understanding of this Arbitrator that the parties would themselves jointly cooperate in examining the relevant records and come to an agreement on this matter.

AWARD

The issue presented by the Union in this arbitration was: whether under the contract between the parties dated June 9, 1969, Mr. Norman J. Alfin was personally bound to the Union and the employees for all obligations owed to the Union and employees by the Corporation. The answer is in

the negative. Mr. Alfin is relieved of such liability due to his justifiable reliance upon the promises made by Union officials acting in due course of their authority, which promises were not fulfilled by the Union officials responsible for carrying out the promises made by them to him.

/s/ JAY W. MURPHY, Arbitrator
Professor of Law
University of Alabama
School of Law
P.O. Box 1574
University, Alabama 35486

ORDER GRANTING PLAINTIFF'S MOTION TO SET ASIDE ARBITRATOR'S AWARD

(Number and Title Omitted) (Filed Feb. 27, 1973)

This cause came on to be heard before the Court at its regularly scheduled motion docket upon tne motion of the plaintiff International Ladies' Garment Workers' Union, AFL-CIO, that the Court enter an order setting aside the award of the arbitrator entered October 23, 1972, on the ground, inter alia, that the arbitrator exceeded his authority contained in the collective bargaining agreement. The Court has considered the motion, the briefs and the argument of counsel and is of the opinion it is due to be granted.

Accordingly, it is ORDERED, ADJUDGED and DECREED that the motion of the plaintiff International Ladies' Garment Workers' Union, AFL-CIO, that the Court set aside the award of the arbitrator entered October 23, 1972 in the above styled cause be and the same is hereby granted.

Done this 26th day of February, 1973.

/s/ FRANK H. MCFADDEN
Chief Judge

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO, PLAINTIFF-APPELLEE,

v.

ASHLAND INDUSTRIES, INC., ET AL., ETC., DEFENDANTS, NORMAN J. ALFIN, DEFENDANT-APPELLANT.

No. 73-2017

Summary Calendar.*

Jan. 21, 1974.

OPINION AND JUDGMENT

An action by a labor union against an employer and the employer's president who had signed a collective bargaining agreement individually as well as for the employer was stayed pending arbitration. The president as an individual contended before the arbitrator that the collective bargaining agreement had been unlawfully induced by the union. The arbitrator found such fraud in the inducement and a motion by the union in the United States District Court for the Northern District of Alabama at Anniston, Frank H. McFadden, Chief Judge, to set aside the award on the ground that the arbitrator had exceeded his authority was granted. The president as an individual appealed. The Court of Appeals held that the president's contention before the arbitrator posed a legal question for the court rather than the arbitrator and should have first been raised in the court suit, and that because it was unclear from the record whether the district court impliedly found the underlying contract to have been lawfully induced, a remand was necessary.

Judgment affirmed insofar as setting aside arbitrator's award; case remanded for action not inconsistent with opinion.

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* Rule 18, 5 Cir.; see Isbell Enterprises, Inc. v. Citizens Casualty Company of New York et al., 5 Cir., 1970, 431 F.2d 409, Part I.

1. Labor Relations § 436

The courts must not succumb to temptation of passing on intrinsic merits of controversy under guise of determining whether dispute is within union contract promise to arbitrate. Labor Management Relations Act, 1947, § 301, 29 U.S.C.A. § 185.

2. Labor Relations § 436

When employer and union have agreed to submit questions of contract interpretation to arbitrator, courts are limited in their roles to ascertaining whether claims to be arbitrated are governed by the contract. Labor Management Relations Act, 1947, § 301, 29 U.S.C.A. § 185.

3. Labor Relations § 431, 436

Arbitration between union and employer is matter of contract, and arbitrarily of issues is matter to be determined by court on basis of the contract. Labor Management Relations Act 1947, § 301, 29 U.S.C.A. § 185.

4. Labor Relations § 483

The courts must review merits of an arbitration to insure that arbitrator has confined his decision to interpretation and application of the collective bargaining agreement. Labor Management Relations Act, 1947, § 301, 29 U.S.C.A. § 185.

5. Labor Relations § 434

Employer or union may be required to submit to arbitration only disputes which it has previously agreed to so submit. Labor Management Relations Act, 1947, § 301, 29 U.S.C.A. § 185.

6. Labor Relations § 454, 483

Arbitrator who derives his power solely from collective bargaining agreement cannot hold such charter to be legally ineffective; question whether he can arbitrate any issue

is legal question for court. Labor Management Relations Act, 1947, § 301, 29 U.S.C.A. § 185.

7. Labor Relations § 455

Corporate employer's president who before arbitrator contended that underlying collective bargaining agreement providing for arbitration had been induced by fraud should have first raised such issue in previous suit brought by union under Labor Management Relations Act. Labor Management Relations Act, 1947, § 301, 29 U.S.C.A. § 185; Fed.RulesCiv.Proc. rule 54(c), 28 U.S.C.A.

8. Courts § 406.9(1)

Where it was unclear from record whether district court had impliedly found that underlying collective bargaining agreement providing for arbitration of grievances had been lawfully induced, remand was necessary; if court found upon remand that agreement was valid, it could order arbitration. Labor Management Relations Act, 1947, § 301, 29 U.S.C.A. § 185.

Appeal from the United States District Court for the Northern District of Alabama.

Before JOHN R. BROWN, Chief Judge, and DYER and SIMPSON, Circuit Judges.

Brown, chief judge:

The question presented is whether the District Court erred in setting aside the award of the arbitrator upon the ground that the arbitrator exceeded his authority contained in the collective bargaining agreement in his holding that the underlying collective bargaining agreement was induced by fraud. While we conclude that the arbitrator invaded the province of the Court and thus no error was committed in setting aside its opinion and award, we have to recognize that this unfortunate result was brought about by the initial failure of the District Court to perceive

its responsibility for determining the validity of the underlying contract and thus the arbitrability of the issues ultimately decided by the arbitrator. But as usual, the fault must lie at the feet of counsel who should have anticipated the problem. We affirm the setting aside of the arbitrator's award but reverse and remand for further proceedings.

The facts may be stated briefly. The Union [1] executed a collective bargaining agreement on May 1, 1969 with Employer.[2] The contract was signed by Norman J. Alfin, as president of the Employer and also individually. Employer encountered financial problems and ceased operations in October of 1969. The Union filed a § 301 suit against Employer and against president Alfin seeking to recover [3] certain sums owing under the agreement.

A default judgment was taken against the Employer on April 6, 1971. In his answer to the § 301 complaint, president Alfin individually set up as a defense Article XXIX of the collective bargaining agreement which stated that the grievance and arbitration procedure shall be the exclusive means for resolution of disputes arising out of a breach of the collective bargaining agreement. The Union then filed a motion for summary judgment or in the alternative for an order compelling arbitration. On April 11, 1972 the District Court stayed the case pending arbitration. It warrants emphasis that in no way up to this point did Alfin challenge the validity of the underlying collective bargaining agreement.

In the arbitration proceeding, president Alfin advanced the contention that he had been unlawfully induced to make the contract by an agent for the Union. The alleged inducement was said to have consisted of a promise by a

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[1] International Ladies' Garment Workers' Union, AFL-CIO.

[2] Ashland Industries, Inc.

[3] This is the subject matter of the "grievance" submitted to, but never decided by, the arbitrator.

Union official that the Employer would become a "registered shop" for, and receive business from, the Villager (a large dress manufacturer) if Alfin signed the contract. President Alfin contended that, having signed the contract individually in reliance on these representations, Employer was never registered as promised and accordingly the Villager began curtaining its work sent to Employer culminating in a final cessation which was ultimately responsible for Ashland going out of business. The written collective bargaining agreement itself contained no references to any such promises by the Union.

The arbitrator found fraud in the inducement of president Alfin's personal liability under the collective bargaining agreement and concluded that the contract was not enforceable against him. Thus the merits of the grievance (see note 3, *supra*) as such were not reached by the arbitrator. Thereafter, the Union filed a motion in the District Court to set aside the award on the grounds that the arbitrator had exceeded his authority. The Court granted the motion on February 26, 1973.

[1, 2] In concluding that the trial court did not err in setting aside the award of the arbitrator we are not unmindful of, nor do we succumb to "the temptation of passing on the intrinsic merits of the controversy under the guise of determining whether the dispute is within the promise to arbitrate." Taft Broadcasting Co. v. Radio Broadcast Technicians Local Union No. 253, 5 Cir., 1962, 298 F.2d 707, 709. The trilogy opinions [4] forewarned courts against making such an invasion of the arbitrational tribunal. In the same air of detached supervision, when parties

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[4] United Steelworkers of America v. American Manufacturing Co., 1960, 363 U.S. 564, 80 S.Ct. 1343, 4 L.Ed.2d 1403; United Steelworkers of America v. Warrior & Gulf Navigation Co., 1960, 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409; United Steelworkers of America v. Enterprise Wheel & Car Corp., 1960, 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424.

have agreed to submit questions of contract interpretation to an arbitrator, courts are limited in their roles to ascertaining whether the claims to be arbitrated are governed by the contract. United Steelworkers of America v. American Manufacturing Co., *supra*, 363 U.S. at 567-568, 80 S.Ct. 1343.

[3-5] Notwithstanding these compelling policy considerations, arbitration is a matter of contact and it follows that the arbitrability of issues is a matter to be determined by the Court on the basis of the contract entered into by the parties. Atkinson v. Sinclair Refining Co., 1962, 370 U.S. 238, 82 S.Ct. 1318, 8 L.Ed.2d 462; John Wiley & Sons v. Livingston, 1964, 376 U.S. 543, 84 S.Ct. 909, 11 L.Ed.2d 898. Courts must review the merits of an arbitration to insure that the arbitrator has confined his decision to interpretation and application of the collective bargaining agreement. Safeway Stores v. American Bakery and Confectionary Workers, 5 Cir., 1968, 390 F.2d 79, 81-82. Thus basic to the orderly effectuation of a national policy designed to minimize industrial strife is the proposition that a party may be required to submit to arbitration only disputes which he has previously agreed to so submit. United Steelworkers of America v. Warrior and Gulf Navigation Co., *supra*, 363 U.S. at 574, 80 S.Ct. 1347.

Usually the problem turns on whether a particular dispute is within the arbitration agreement as the subject for arbitration. Other times it may go to the sort of remedy which the arbitrator can prescribe to effectuate a decision on a matter admittedly within the scope of arbitrability.

But that is not what happened here. Alfin first set up as a defense to the Union's § 301 suit the arbitration clause as an exclusive means for resolution of disputes. No one questioned then or now that the disputes (see note 3, *supra*) were within the grievance clause. The order of stay and reference to an arbitrator was eminently correct. But after being successful in attaining a stay in the District Court

pending arbitration, he assumed the inconsistent position of attacking the validity of the very contract which included the arbirtation clause which he successfully invoked.

[6] It is our view that Alfin's attack upon the validity of the underlying contract goes to the heart of whether there is *any*thing to arbitrate—not just *what* there is to arbitrate—and thus poses a legal question for the Court rather than the arbitrator. The arbitrator who derives his power solely from the contract cannot hold that charter to be legally ineffective. United Steelworkers of America v. Enterprise Wheel & Car Corp., *supra*, 363 U.S. at 597, 80 S.Ct. 1358; Safeway Stores v. American Bakery and Confectionary Workers, *supra*, 390 F.2d at 81; Local Union No. 787, International Union of Electrical Radio and Machine Workers v. Collins Radio Co., 5 Cir., 1963, 317 F.2d 214, 216. The parties have found no federal decision contrary to our conclusion. And the only one put forward by Alfin is In The Matter of the Arbitration between Weinrott v. Carp, 32 N.Y.2d 190, 344 N.Y.S.2d 848, 298 N.E.2d 42 (filed April 26, 1973), which we decline to follow.

[7, 8] Thus, the time and place for determination of the validity of the underlying collective bargaining agreement was the § 301 suit first filed by the Union. Though Alfin failed at this time to raise in his pleadings his later contentions concerning the validity of the contract, arguably F.R.Civ.P. 54(c) entitles him to such a determination even if relief was not demanded in his pleadings. Because it is unclear from the record whether the District Court impliedly found the underlying contract to have been lawfully induced, we must remand to the lower court for its consideration of this issue. If the District Court finds that the collective bargaining agreement (to which Alfin was a party) was valid, it may then proceed to order the particular grievances arbitrated. In the light of the history of this case any such order of supplemental reference to a new

arbitrator should be sufficiently specific. If, on the other hand, it finds in the negative, arbitration may not be ordered absent prior contractual agreement.[5]

We affirm the judgment of the District Court insofar as it set aside the award of the arbitrator but remand the case for action not inconsistent with this opinion.

Affirmed and remanded.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1973

No. 73-2017

Summary Calendar

D.C. Docket No. CA 70-96

Before BROWN, Chief Judge, DYER and SIMPSON, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed insofar as it set aside the award of the arbitrator; and that this cause be, and the same is hereby remanded to the

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[5] Although not crystal clear, the action of the District Court in conjunction with or following the order setting aside the award is sufficiently dispositive to give requisite finality to the orders permitting appeal, at least in the Cohen v. Beneficial Industrial Loan Corp., 1949, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528, sense.

said District Court for action not inconsistent with the opinion of this Court;

It is further ordered that defendant-appellant pay to plaintiff-appellee, the costs on appeal to be taxed by the Clerk of this Court.

January 21, 1974

Issued as Mandate: Feb. 12, 1974

COLLECTIVE BARGAINING AGREEMENT

THIS AGREEMENT MADE AND ENTERED INTO THIS 10th day of June 1969, by and between ASHLAND INDUSTRIES, INCORPORATED located at ASHLAND, ALABAMA, hereinafter designated as the "Employer", and Local 390 and the Southeast Region of the International Ladies' Gardent Workers' Union, said Local being an unincorporated association and hereinafter designated as the "Union", for and in behalf of itself and the employees now employed or hereafter to be employed by the Employer.

WITNESSETH:

WHEREAS, the Employer represents that it is engaged in the apparel and clothing industry in the making of women's apparel; and

WHEREAS, the workers employed by the Employer have duly designated the Union as their exclusive bargaining representative for the purpose of collective bargaining with the Employer with respect to rates of pay, wages, hours and other conditions of employment; and

WHEREAS, the parties desire to cooperate in establishing conditions which will tend to secure a living wage, improved working conditions and fair competition insofar as labor cost is concerned, and to provide methods for a fair and peaceful adjustment of all disputes that may arise between the parties;

NOW, THEREFORE, in consideration of the mutual promises and obligations herein assumed and contained,

and other good and valuable considerations, the parties agree as follows:

Article I: Mutual Obligations

The parties agree that this agreement shall be binding upon them and their respective transferees, successors and assigns, and that they will faithfully comply with its provisions. In the event the Employer sells or transfers the business or the shop, the Employer shall nevertheless continue to be liable for the complete performance of this agreement until and unless the purchaser or transferee expressly acknowledges in writing that it is fully bound by the terms of this agreement.

Article II: Union Recognition

The bargaining unit covered by this agreement consists of all nonsupervisory production, maintenance, packing and shipping workers employed by the Employer. It is agreed that the Union represents a majority of such workers and that it shall be the sole and exclusive bargaining representative for all workers in the bargaining unit during the entire period of this agreement. Neither the Employer nor any of its agents shall directly or indirectly discourage membership in the Union.

Article III: Union Membership

1. Unless at the time prohibited by law, membership in the Union shall be a condition of employment for all employees upon completion of their trial period.

2. In the event that paragraph 1 may not be lawfully applied, all employees shall be informed by the Employer of the existence of this agreement and the terms thereof and shall be advised by the Employer that, in its opinion, good labor management relations are and will be best served and promoted if the employees become and remain members of the Union. The Employer agrees to implement and promote this provision by posting copies of the following

notice near all time clocks and on bulletin boards and other prominent places:

"NOTICE TO ALL EMPLOYEES

"This shop is being operated under the terms of an agreement with the International Ladies' Garment Workers' Union, AFL-CIO. All wages, hours and other conditions of employment are regulated by the terms of this agreement. Good labor-management relations will be best served and promoted, in our opinion, if all our employees covered by this agreement become and remain members of this Union.

Signed _____

_____
Name of Employer"

Article IV: Trial Period—Notification

1. Newly hired workers shall be deemed during their first six (6) weeks of employment to be engaged for a trial period, during which they may be discharged without regard to cause.

2. The Employer shall notify the Union monthly in writing of all new employees hired and of all employees terminated.

Article V: Check-Off

The Employer agrees to deduct membership dues (which shall be deemed to include periodic fixed dues, initiation fees, and assessments) from the earnings of its employees monthly and transmit the same to the Union or its designee within forty-eight (48) hours thereafter, subject to the requirements of law concerning authorization and assignment by the workers individually. Sums so deducted by the Employer shall be kept separate and apart from the general funds of the Employer and shall be held in trust by the Employer for the benefit of the Union.

Article VI: Hours of Work: Overtime:

During the first eighteen (18) months of this agreement the regular hours of work shall be seven and one-half (7½) hours per day and thirty seven and one-half (37½) hours per week divided equally among the first five (5) working days for the week and overtime at the rate of time and one-half shall be paid for all work performed outside regular working hours.

During the last eighteen (18) months of this agreement effiective on November 11, 1970 the regular hours of work shall be seven (7) hours per day and thirty five (35) hours per week divided among the first five (5) working days of the week and overtime shall be paid as provided above.

Article VII: Wages and Standards

All workers whether piece workers or hourly paid workers shall receive the following percentage increases in their rates of pay on the dates specified:

May 1, 1969	10%
May 1, 1970	3%
November 1, 1970	10%
May 1, 1971	3%

All workers shall receive the increases provided above or be raised to the minima as set forth below, whichever is greater. At the times of reductions in the regularly scheduled working hours (5-1-69) and 11-1-70) all workers, whether piece workers or hourly paid workers shall receive increases larger than those provided above if necessary to compensate them for the reduction in hours so that they shall earn at least as much in the reduced number of hours as they earned prior to the reduction.

Effective	Piece Workers	Service Girls	Assorters & Shippers	Spreaders	Cutters
5-1-69	$1.80	$1.90	$1.95	$2.15	$3.01
5-1-70	1.85	1.95	2.00	2.20	3.20
11-1-70	2.00	2.10	2.15	2.40	3.40
5-1-71	2.05	2.15	2.20	2.50	3.50

Piece Work Add On: The increases provided above shall be applied to piece rates in the form of a percentage add on to piece rate earnings in the following amounts:

Effective Date	Piece Rate Add On
5-1-69	10%
5-1-70	13%
11-1-70	24%
5-1-71	28%

Piece rates: Piece rates shall be set to yield an operator of average skill and ability no less than 20% more than the minimum for piece workers.

Bundle Allowance: Piece workers shall be paid a special bundle allowance of 2¢ for each bundle of 12 or less pieces. This special allowance shall be in addition to the piece rates paid for such work but shall be considered to be piece work earnings.

Progression for Spreaders: Newly hired apprentice spreaders shall be paid no less than $1.70 per hour. At the end of their trial period they shall receive an increase equal to one-half the difference in their then current rate of pay and the contractual minimum for spreaders. At the end of three months following completion of their trial period apprentice spreaders shall be increased to the contractual minimum for spreaders.

Progression for Cutters: Newly designated apprentice cutters shall be paid no less than 15¢ per hour more than the contractual minimum for spreaders and shall receive an increase of 15¢ per hour every three months. At the end of 12 months they shall be increased to the contractual minimum for cutters.

Retroactivity: All increases and benefits provided in this agreement shall become effective or be paid retroactively to May 1, 1969.

Wages shall be paid weekly on a fixed day.

No homework shall be permitted.

The Employer shall comply with all the standards of sanitation and safety required by law.

The Employer shall not charge workers for damage to material unless caused wilfully.

If the settlement of piece rates has been unduly delayed by the Employer, workers shall not be required to work on garments for which the piece rates have not been finally settled unless the Union directs otherwise. When piece rates are settled, such rates shall be retroactive to the inception of the work.

The Employer shall send to the Union office monthly a copy of its payroll for the last work week of the preceding month, which shall show the hours and pay of each employee in the bargaining unit. The Employer shall also make available to the Union upon its request the date employed in setting wages or piece rates.

A worker shall be compensated for time lost through excessive machine breakdown, and shall also be compensated for excessive waiting time from other causes for which such worker is not responsible.

Wages, prices, standards and other working conditions now existing or hereafter established in the Employer's shop shall not be allowed.

The prevailing system of work, namely, time or piece work, shall not be changed during the term of this agreement, except by mutual agreement between the Union and the Employer.

The Employer may grant merit, length-of-service, or other individual increases or adjustments only upon approval by the Union.

Article VIII: Discharges and Discipline

No worker shall be discharged or otherwise disciplined without good and sufficient cause, except during his trial period. If the discharge or disciplinary act is found to be unjustified, the worker may be compensated for his loss of earnings during the period of such discharge or disciplinary act.

Article IX: Distribution of Work

1. At all times work shall be distributed among the workers on an equal and equitable basis.

2. No member of the Employer or supervisory employee or designer or any person outside the bargaining unit shall perform any work in any job covered by this agreement.

3. If a worker has been laid off and any member of the Employer or supervisory employee or designer or any person outside the bargaining unit does his work, the Employer shall reimburse the worker so laid off for his loss of earnings and shall immediately reemploy him.

Article X: Chairlady—Grievance Committee

There shall be a Shop Chairlady and Grievance Committee selected by or under the auspices of the Union. The Shop Chairlady shall be compensated by the Employer for time unavoidably lost during working hours in the process of adjusting grievances.

Article XI: Fair Employment Practices

The Employer shall not discriminate against any employee or applicant for employment because of race, creed, color, national origin, sex or age.

Article XII: Assignment to Other Work

1. A worker who is requested to perform work other than his regular work while his regular work is available shall receive for such other work his average hourly earnings in his regular work during his last four (4) weeks of

full employment prior to the change, or his earnings in the new work, whichever is greater.

2. A worker who is requested to perform work other than his regular work while his regular work is unavailable shall receive for such other work the established piece or time rate therefor or a mutually agreed on guaranteed rate, but in no event less than the minimum provided in this agreement.

Article XIII: Holidays

During the first year of this agreement the following holidays shall be paid holidays:

New Year's Day
July 4th
Labor Day
Thanksgiving Day
The last working day before Christmas and Christmas Day

During the second year of this agreement Good Friday shall be added as a paid holiday.

During the third year of this agreement one-half of any State or National Election Day, to be designated by the Union, shall be observed as a paid holiday.

Any of the above holidays falling on a Saturday shall be observed on the preceding Friday. Those falling on a Sunday shall be observed on the following Monday.

Holiday pay shall be paid and computed as provided in Article XIII of this agreement.

Article XIV: Right to Leave Shop—Call-in Time

Workers shall not be required unreasonably to remain in the shop during the day when there is no work for them. All workers who are requested or permitted to report for work shall be supplied with at least one day's continuous work or be paid therefor at their average hourly earnings

in their regular work during their last four (4) weeks of full employment. In the event that workers are notified in advance they may at their option report to work for as little as one-half (½) day's work or pay and thereby not be entitled to the full day's pay provided in this paragraph.

Article XV: Benefit Funds

1. The Employer shall pay weekly to the Union a sum equivalent to nine and one-half (9½%) per cent of its total gross weekly payroll (before deduction for federal or state taxes) of all the non-supervisory production, maintenance, packing and shipping workers (whether Union or non-Union workers and whether regular or trial period workers) employed in any of its own shops. Such payments shall be allocated as follows:

(a) Seven (7%) per cent towards the Southeastern Regional ILGWU Health and Welfare Fund, a trust fund established by collective agreement and maintained in trust for the purpose of providing workers with health, welfare, and recreation benefits and services.

(b) Two (2%) per cent towards the ILGWU National Retirement Fund, a trust fund established by collective agreement for the purpose of providing pensions or annuities on retirement or death of workers.

(c) One-half (½%) per cent towards the Supplementary Unemployment Severance Benefits Funds, ILGWU, a trust fund established by collective agreement for the purpose of providing workers with supplementary unemployment-severance benefits.

None of the payments made hereunder by the Employer shall constitute or be deemed wages due to the workers.

2. The said Health and Welfare Fund, the said Retirement Fund and the said Supplementary Unemployment-Severance Benefits Fund each shall be administered in accordance with its by-laws or rules and regulations by

a Board of Trustees. Each Board of Trustees shall be composed of union representatives and an equal number of representatives of employer contributors to that Fund. In the event that the Board of Trustees shall be deadlocked on any issue or matter arising in connection with its Fund, the same shall be decided by a neutral person as set forth in the by-laws or rules and regulations of said Fund, and his decision shall be final and binding. The parties hereto hereby ratify, confirm and approve the composition and membership of each Board of Trustees as now or hereafter constituted.

Each Board of Trustees shall adopt and promulgate such by-laws or rules and regulations to effectuate the purpose of its Fund as it may deem necessary and desirable, including the detailed basis upon which payments from the Fund will be made, and shall have the power to modify the same from time to time. The parties hereto agree to be bound thereby and they are hereby incorporated in and made part of this agreement.

An annual audit of each Fund shall be made by accountants designated by its Board of Trustees. A statement of the results of such audit shall be made available for inspection by interested persons at the principal office of the Fund and at such other places as may be designated by its Board of Trustees.

The Employer shall have no legal or equitable right, title, claim or interest in or to said Funds. No individual worker shall have any legal or equitable right, title or interest in, or claim against, his or any other employer's payments toward said Funds or against said Funds, except as may be provided by the by-laws or rules and regulations of said Funds.

None of the monies paid into each of said Funds shall be used for purposes other than those permitted by law, and to pay the operating and administrative expense of such Fund. The monies of each of said Funds shall be kept separate and apart from all other monies.

3. The Board of Trustees of each said Fund is hereby authorized and empowered, in its sole discretion and upon such basis as it deems desirable, to transfer or mingle the assets of said Fund or to merge said Fund with another health and welfare fund or funds, with another retirement fund or funds, or with another supplementary unemployment-severance benefits fund or funds, as the case may be, now or hereafter existing and established by collective agreement with any unit of the International Ladies' Garment Workers' Union or with the said International itself. In the event of such transfer, mingling or merger, the amounts hereinabove provided to be allocated toward the particular Fund shall thereafter be paid over to the fund or funds with which there has been such transfer, mingling or merger.

4. The Union or the Board of Trustees of the Fund, or either of them, shall be proper parties in interest to enforce collection of payments due from the Employer toward said Fund. In the event any amount due from the Employer under this Article XV remains unpaid for thirty (30) days after becoming due, such amount shall automatically bear interest thereafter at the rate of six (6%) per cent per annum and the Employer shall pay the same.

Article XVI: Individual Contracts—Sub-Contracting

1. The Employer shall not enter into any individual contracts with any of its workers without prior Union approval.

2. No contractor shall sub-contract its work to any other shop without prior Union approval.

Article XVII: Job Rights, Illness, Leave of Absence

1. An employee who has been absent by reason of his own bona fide illness, subject to verification, and returns to work within one hundred and twenty (120) days of the commencement of such absence, shall be entitled to the

job last performed prior to such absence, if available, otherwise to any job, with entitlement to his original job if same becomes available during the succeeding four (4) months. Such employee's continuity of service shall be preserved. If an employee returns to work within 30 days after being granted a leave of absence as described in this paragraph she shall be unconditionally entitled to her regular job category.

If such employee returns after one hundred and twenty (120) days of such absence but not later than one hundred and eighty (180) days of such absence, then such employee shall be entitled to any available job and the employee's continuity of service shall be preserved.

2. An employee may obtain a leave of absence up to one hundred and eighty (180) days upon written application to the Employer. Any leave of absence may be extended up to an additional one hundred and eighty (180) days for good cause shown. The Employer shall not unreasonably withhold his consent to the original application or the extension.

Article XVIII: Contractors—Additional Shops—Moving—Integrated Production

1. The Employer shall have no work performed outside of its own shop unless the workers of its inside shop are fully supplied with work, and unless such outside shop is under contract with a unit of the International Ladies' Garment Workers' Union and has complied with the terms thereof, is registered by the Employer with the Union herein, and maintains at least the standard of wages and hours established under the agreement herein. With respect to any work done by such outside shop on garments for the Employer, the Employer herein shall also be responsible to the employees of such outside shop for their unpaid wages and to the appropriate unit of the International Ladies' Garment Workers' Union for dues and other monies due it.

2. Should the Employer desire to expand or open an additional shop, notice thereof shall be given by said Employer to the Union prior to the expansion or opening of such shop and such shop shall be operated under all the terms and conditions of this agreement. In no case, however, shall the operation of such shop result in reducing the work or the number of workers at present employed in the shop to which this agreement is now applicable.

3. The Employer agrees that during the term of this agreement it shall not move its shop from its present location unless mutually agreed between the parties.

4. In order to safeguard working standards and employment opportunities of the workers covered by this and other agreements in the garment industry, it is agreed that all garments or parts thereof handled by the Employer during the term of this agreement, whether finished or partly finished, shall be manufactured exclusively either in its own shop or, as parts of an integrated process of production under the jobber-contractor system of production, in a shop under contract with a unit of the International Ladies' Garment Workers' Union; and accordingly the Employer shall not handle, purchase, import, or otherwise obtain, directly or indirectly, any other wholly or partly finished garments whatsoever during the term of this agreement.

Article XIX: Crossing Picket Line

To the extent permitted by law, it shall not be considered a breach of this agreement on the part of the Union or on the part of any individual employee if any employee or employees refuse to cross any picket line recognized by the Union or to enter upon the picketed premises of the Employer, either of their own volition or by direction of the Union, nor shall such refusal be cause for discharge or discipline.

Article XX: Struck Work

The Employer shall not perform any work for or give any work to any jobber, manufacturer, contractor, or subcontractor engaged in the apparel and clothing industry against which a strike has been declared, and in no event shall it request any of its employees to perform work destined directly or indirectly for such concern. Such work shall not be deemed in the workers' regular course of employment, and the workers need not perform such work.

Article XXI: Lay-Off and Recall

In the event of a reduction of force in any department for any reason, the workers shall be laid off in inverse order of seniority, provided, however, that the worker retained can perform the work satisfactorily. Upon resumption of work, the workers shall be recalled in reverse sequence, i.e., the last laid off shall be the first recalled. Seniority status shall not be affected by a lay-off.

Article XXII: Access to Shop—Examination of Books

1. Representatives of the Union shall have access to the shop of the Employer for the purpose of taking up complaints and for the purpose of ascertaining whether the terms of this agreement are being complied with.

2. The Employer shall, upon request, submit to representatives of the Union the payroll books and all other pertinent records for examination for the purpose of ascertaining whether the Employer has complied with the terms of this agreement.

3. The failure of the Employer to permit access to the shop or to submit such books and records shall be presumptive evidence of the violation complained of and shall justify sustaining the Union's complaint. Moreover, in the event of such failure by the Employer, the Union at its option may consider that the Employer has forfeited its rights under the agreement.

Article XXIII: Agency

The Employer agrees that the sole persons authorized or having the power to act as agents of the Union, or to bind the Union legally with respect to matters arising out of this agreement or arising out of the relations between the Employer and the Union, or to subject the Union to any liability whatever by reason of any act or omission are the Regional Director of the Union and the designated Business Agent servicing the shop (or such substitute or additional persons as the Union may hereafter formally designate by written notice to the Employer). The Union shall not be responsible for the acts or omissions of any other person, including members and employees of the Union.

Article XXIV: Non-Payments—Responsibility

1. Notwithstanding Articles XXVIII and XXIX or any other provision of this agreement, if the Employer fails for five (5) days to pay in full any wages due to the workers covered by this agreement, any dues or other monies due to the Union, any payments due under ARTICLE XVIII, or any payments due towards the Funds as provided in ARTICLE XV, the Union may immediately direct the workers to discontinue work until all sums due have been paid in full and/or may immediately institute action at law or equity or before an administrative tribunal to obtain payment of such sums. These rights shall be in addition to all other remedies available to the Union.

2. The officers, directors and stockholders of the Employer shall, as individuals as well as in their corporate capacities, be personally liable, jointly and severally, for full compliance with this agreement including the payments above set forth.

3. In the event of any breach of this agreement by the Employer (including any non-payment by the Employer of sums due to any employees for wages, holiday pay, or otherwise) the Union in its own name shall be a proper

party in interest to enforce compliance by the Employer with this agreement on the Union's own behalf and on behalf of any affected employees without further assignments or authorizations from them.

Article XXV: Rise in Cost of Living

Should there be a rise in the cost of living, the parties will meet for the purpose of considering an increase in wages commensurate therewith. In the event of any disagreement, the matter shall be treated as a dispute under Article XXIX.

Article XXVI: Change in Legal Minimums

Should federal or state legislation be enacted increasing minimum wages under the law, the minimum wages under this agreement shall in no event be less than twenty-five (25¢) cents above said legal minimum wage. It is further agreed that, upon any such increase in minimum wages, the Union shall have the right to renegotiate upward the piece rate and wage structure of the shop. In the event of any disagreement, the matter shall be treated as a dispute under Article XXIX.

Article XXVII: Limitation on Vacations

The Employer shall not designate or provide a vacation period or shut down its shop (or a part thereof) for the purpose of providing a vacation unless the particular action is effected pursuant to a written agreement signed by the Employer and the Union (through its representative designated in Article XXIII) particularly specifying a vacation as the purpose thereof. Any action contrary to the foregoing, whether taken by the Employer unilaterally or with the consent of any individual employee or group of employees, shall be wholly ineffective and shall not be deemed to constitute or provide a vacation until such time as the parties may agree otherwise the plant shall be closed during the week of July 4th for vacation.

During June of 1969 the employer shall pay all workers, as a vacation benefit a sum equal to 2% of their gross earnings during the calendar year 1968.

Article XXVIII: No-Strike, No-Lockout Pledges

The Union agrees that it will not call, authorize or ratify a strike or stoppage during the life of this agreement, except for the Employer's failure to submit to arbitration or to comply with the decision of an arbitrator. Should any strike or stoppage occur, the Union's sole obligation shall be to endeavor in good faith, within twenty-four (24) hours after receipt of written notice thereof from the Employer, to bring about the return to their work of its members who have stopped work. Upon the failure of any employees to return to work within said twenty-four (24) hour period, the Employer may at its option consider that such employees have abandoned their employment; but should the Employer reemploy such employees, it shall treat all such employees alike and shall not discriminate against or among them. Compliance by the Union in good faith with this provision shall be deemed full compliance with the Union's obligation hereunder.

The foregoing no-strike, no-stoppage obligations shall be wholly suspended and of no force and effect, and the Union may call, authorize or ratify a strike or stoppage, during the continuance of any strike or stoppage (not a violation of contract) declared by the International Ladies' Garment Workers' Union or any unit thereof at any plant of any firm which is directly or indirectly affiliated with or related to the Employer herein.

The Employer agrees that it will not order, authorize or ratify a lockout during the life of this agrement. Should any lockout occur, the Employer's sole obligation shall be to endeavor in good faith, within twenty-four (24) hours after receipt of written notice thereof from the Union, to terminate the lockout and to reemploy the employees. Upon the failure of the Employer to do so within said twenty-four

(24) hour period, the Union at its option may treat the matter as a dispute under Article XXIX, or may consider that the Employer has forfeited its rights under the agreement.

Article XXIX: Adjustment Machinery—Court Actions Barred

1. Any and all disputes, complaints, controversies, claims or grievances whatsoever between the Union or any employees and the Employer or any person responsible under Article XXIV, which directly or indirectly arise under, out of, or in connection with or in any manner relate to this agreement or the breach thereof, or the acts, conduct or relations between the parties shall be adjusted as follows:

(a) The Shop Chairlady and the Grievance Committee, with or without a representative of the Union, shall attempt to settle the matter with a representative of the Employer. No adjustment shall be deemed binding on the Union unless approved by an authorized representative thereof.

(b) If they shall fail satisfactorily to dispose of any such dispute, complaint, controversy, claim or grievance, or if for any reason it has not been taken up by them, or if the matter does not lend itself to the foregoing procedure, the matter shall be submitted to arbitraion before an arbirator agreed on by the parties. If the parties cannot agree on an arbitrator within three (3) days, then upon request of either party the Federal Mediation and Conciliation Service shall designate the arbitrator and the arbitration shall be conducted in accordance with its rules. The award or decision of the arbitrator, in addition to granting such other relief as the arbitrator may deem proper, may contain provisions commanding or restraining acts and conduct of the parties. If either party shall default in appearing before the arbitrator, he is empowered nevertheless to take the proof of the party appearing and render an award

thereon. Any award or decision of the arbitrator shall be final and binding and shall be enforceable by appropriate proceedings at law or in equity. The taking of the oath by the arbitrator is hereby expressly waived. His fee shall be borne equally by the parties hereto.

(c) The parties agree that any papers, notices or processes to initiate or continue an arbitration hereunder, and all papers, notices or processes in any application to a court to confirm or enforce an arbitration award hereunder, including service of the papers conferring jurisdiction of the parties upon the court, may be served by registered mail directed to the last known address of the Employer or the Union.

2. It is intended and agreed that the procedure herein established for the adjustment of disputes shall be the exclusive means for the determination of all disputes, complaints, controversies, claims or grievances whatsoever, including the arbitrability of any dispute, and including claims based upon any breach of the no-strike, no-stoppage pledges of this agreement or upon any other breach of this agreement. It is intended that this provision shall be interpreted as broadly and inclusively as possible. Neither party shall institute any action or proceeding in a court of law or equity, state or federal, or before an administrative tribunal, other than to compel arbitration, as provided in this agreement, or with respect to the award of an arbitrator. This provision shall be a complete defense to and also ground for a stay of any action or proceeding instituted contrary to this agreement.

3. Any dispute, complaint, controversy, claim or grievance which any employee may have against the Employer may be instituted and processed only by the Union in the manner herein provided. No employee shall have the right individually to institute or process any action or proceeding with reference to any dispute, complaint, controversy, claim or grievance; or to initiate or compel arbitration in

the event the Union fails or refuses to proceed with arbitration.

Article XXX: New Products

If the Employer at any time makes garments in any branch of the garment industry other than or in addition to the branch in which the Employer is presently engaged, the Union at its option may forthwith renegotiate the terms of this agrement. In the event of any disagreement concerning the new terms, the matter shall be treated as a dispute under Article XXIX.

Article XXXI: Vending Machines

The employer grants to Local 390 the exclusive right to operate and receive the profits from all vending machines of any kind whatsoever located on the employer's premises. The profits from such machines shall be used exclusively for the establishment of a special Local 390 Educational, Recreational and Scholarship Fund.

Article XXXII: Subsidiary, Auxiliary or Affiliated Firms

1. Subsidiary, auxiliary or affiliated firms or corporations in the garment industry shall, for the purpose of this agreement, be deemed bound by all the terms of this agreement. The arbitrator selected as provided in Article XXIX shall have the right and power to determine whether an alleged subsidiary, auxiliary or affiliate of the Employer is such subsidiary, auxiliary or affiliate, and shall be guided by the proof of facts tending to establish a plan, scheme or device on the part of the Employer to avoid or evade the provisions of this agreement by or through such subsidiary, auxiliary or affiliate.

2. The Employer shall not enter into any partnership or consolidate or merge with another person, firm or corporation in the industry, unless the new firm assumes all accrued obligations to the workers covered by this agreement, the Union, and the Funds towards which payments are re-

quired under Article XV. Upon the formation of such partnership or upon such consolidation or merger, such new firm shall give preference in employment to the workers of the absorbed concern covered by this agreement over all other workers except those then employed by the firm which continues in business.

Article XXXIII: Union Label

The Employer shall affix an ILGWU Union Label to all garments manufactured in its shops and in the shops of its contractors, if any, in accordance with the rules, regulations, and procedures promulgated by the International Ladies' Garment Workers' Union. The Employer shall purchase the labels from the Union at the same price and use them under the same terms and conditions as are applicable in the major market in the same branch of the garment industry in which the Employer is engaged.

Article XXXIV: Liquidated Damages for Violations

Should the Employer violate any provision of this agreement where it is difficult or impossible to ascertain the specific amount of damages suffered by its workers or the Union, then the Employer shall be liable to the Union for liquidated damages. In fixing these damages, there shall be taken into account any advantages gained by the Employer through its violation, any deprivation of earnings suffered by workers, and such other factors as are fair under the circumstances. If the Union and the Employer are unable to agree upon the amount of liquidated damages for such violation, then the matter shall be treated as a dispute under Article XXIX. The proceeds of any such liquidated damages shall be paid to the Union.

Article XXXV: Blue Cross/Blue Shield

The employer agrees to participate in the group insurance plan negotiated by the Southeast Region ILGWU Health & Welfare Fund with Blue Cross/Blue Shield. The

employer agrees to pay the cost for Blue Shield protection for all workers electing such coverage. The employer further agrees to pay all except $8.00 of the cost of family Blue Cross/Blue Shield for all workers electing such coverage. The employer will deduct $8.00 each month from the pay of such workers and forward same, together with his own contribution, to Blue Cross/Blue Shield. Such insurance coverage shall be available to all eligible workers on the first day of the month following completion of their trial period and the employer's contributions shall continue during periods of layoff and during approved leaves of absences up to 6 months.

Article XXXVI: Conformity to Law—Saving Clause

1. If any provision or the enforcement or performance of any provision of this agreement is or shall at any time be contrary to law, then such provision shall not be applicable or enforced or performed, except to the extent permitted by law. If at any time thereafter such provision or its enforcement or performance shall no longer conflict with the law, then it shall be deemed restored in full force and effect as if it had never been in conflict with the law.

2. If any provision of this agreement or the application of such provision to any person or circumstance shall be held invalid, the remainder of this agreement, or the application or such provision to other persons or circumstances, shall not be affected thereby.

Article XXXVII: Term

This agreement shall go into effect as of the 1st day of May 1969, and shall continue in effect until the 1st day of May 1972, and shall thereafter automatically be renewed from year to year unless either party shall notify the other party in writing at least sixty (60) days prior to any such expiration date that it desires to change or modify the terms thereof.

IN WITNESS WHEREOF, the parties have caused this agreement to be signed the day and year first above written.

ASHLAND INDUSTRIES, INCORPORATED
Employer

/s/ Norman J. Alfin
as President of said Employer
and also individually.

/s/ Denver Sherrer
Local 390 of the International
Ladies' Garment Workers'
Union

/s/ Ramelle MaCoy
As Associate Regional Director
Southeast Region, ILGWU

SUPREME COURT

JUL 24 1974

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 73-1909

NORMAN ALFIN,
Petitioner,

v.

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO,
Respondent.

BRIEF

In Opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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ISSUE PRESENTED

Was the Court of Appeals correct in holding that attacks on the validity of a collective bargaining agreement must be decided by the court and not the arbitrator?

STATEMENT OF THE CASE

Petitioner's Statement of the Case is not sufficient.

There is a critical omission of the fact that Petitioner, in the district court, did not suggest any fraud in the contract's inception. That issue, as the Court of Appeals noted, was raised by Petitioner for the first time before the arbitrator.

The petition does not mention that the funds which the Union sought to collect consisted in substantial part of wages due Petitioner's employees for work actually performed on the strength of Petitioner's promise to pay. The arbitrator in holding the contract invalid did not limit his holding to avoiding any future performance under the contract, but actually excused Petitioner from paying his own employees for work already performed.

The opinion of the Court of Appeals adequately states the facts (App. 20a).

REASONS FOR DENYING THE WRIT

The Writ should be denied.

I

There Is No Conflict of Federal Law to Be Resolved.

There is no conflict between circuits, *United States v. Muniz*, 374 U.S. 150, 83 S.Ct. 1850 (1963). The decision of the Court of Appeals does not conflict with any decision of this Court. *Egan v. City of Aurora*, 365 U.S. 514, 81 St. Ct. 684 (1961).

The Court of Appeals has applied the definitive decisions of this Court.

All matters going to the existence of a collective bargaining agreement, and, hence, to the duty to arbitrate, are for the Court. *John Wiley & Sons v. Livingston*, 376 U.S. 543, 84 S.Ct. 909 (1964). Whether petitioner "was bound to arbitrate, as well as what issues . . . [he] must arbitrate, is a matter to be determined by the Court on the basis of the contract entered into by the parties." *Atkinson v. Sinclair Refining, Inc.*, 370 U.S. 238, 241, 82 S.Ct. 1318, 1320; *John Wiley & Sons v. Livingston, supra.*

The Fifth Circuit has been carefully faithful to the proscriptions of the Trilogy.[1] Numerous decisions of that circuit have reaffirmed the finality of collectively bargained arbitration

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[1] *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564, 80 S.Ct. 1343 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 80 S.Ct. 1347 (1960); *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 80 S.Ct. 1358 (1960).

awards upon the merits.[2] That court has only recognized this as one of the exceedingly rare cases in which such an award must be set aside.

Here, the arbitrator did not merely ignore the only issue which was raised by the pleadings[3] and which was referred to him for determination. He undertook to decide the basic issue peculiarly within the court's area of responsibility. And in holding that the collective bargaining agreement was a nullity, he literally cut the ground from beneath himself. For without a contract, there could have been no arbitration; and without determining the existence of the contract, the District Court could not have ordered arbitration in the first place.[4]

Whatever glosses may have been placed upon *Wiley*, the task that it described for the court—that of determining "substantive arbitrability"—remains undiminished.

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[2] *E.g., Safeway Stores v. American Bakery & Confectionery Workers, Local 111*, 390 F.2d 79 (5th Cir. 1968).

[3] Petitioner's answer in the district court, it bears repeating, did not suggest any alleged invalidity of the collective bargaining agreement.

No challenge of any kind was filed to the default judgment, on the identical collective bargaining agreement, against the company.

[4] *Local Union No. 998, Int'l Union, United Automobile Workers v. The B. & T. Metals Co.*, 315 F. 2d 432 (6th Cir. 1963).

III

The Decision Below Is Correct and Is Not to Be Judged by Commercial Law Standards

We are not dealing here with an ordinary commercial contract, but with a collective bargaining agreement.[5] This Court made clear in *Wiley, supra* at 550: ". . . a collective bargaining agreement is not an ordinary contract. . . . Central to the peculiar status and function of a collective bargaining agreement is the fact, dictated both by circumstance . . . [citations omitted] and by the requirements of the National Labor Relations Act, that it is not in any real sense the simple product of a consensual relationship." See also *Lewis v. Benedict Coal Co.*, 361 U.S. 459, 80 S.Ct. 489 (1960).

Undoubtedly, on the remand ordered in this case by the Fifth Circuit, it will become obvious again that petitioner has no real defense of fraud.

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[5] Appellant would make the impermissible analogy to authorities dealing with arbitration under ordinary commercial contracts. See, *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402 (2nd Cir. 1959), *Prima Paint v. Flood & Conklin*, 388 U.S. 395 (1967), and *Weinrott v. Carp*, 32 N.Y.2d 190, 344 N.Y.S. 2d 848. They all concerned commercial contracts, and do not deal with the unique importance and characteristics of arbitration in federal labor law.

IV

CONCLUSION

In sum, there was no yielding here to the arbitrator of any jurisdiction to decide the threshold question of the contract's existence. No such transfer of authority was possible. The arbitrator's jurisdiction under the district court's referral order was confined to determining liability under the terms and provisions of a valid collective bargaining contract. Petitioner's belated attack upon the underlying contract, voiced for the first time in the arbitration proceeding, could not enlarge the jurisdiction of the arbitrator or endow him with the authority which he did not and could not possess under governing federal law.

The issue of fraud in the inducement was withheld by Petitioner from the district court. He led that court to believe he was relying upon the contract and its procedures. He then sought, before the arbitrator, to raise that defense both to avoid the very contract he had asserted, and even to avoid compliance with the contract to the extent it had been performed by his employees.

Petitioner's claim is without merit and is singularly inappropriate for review by this Supreme Court.

None of the applicable federal cases which have come in the Trilogy's wake (and Petitioner cites none) hold that issues as to the creation of a contract are for the arbitrator.

There is general agreement, of course, that issues properly triable before an arbitrator will likely receive expeditious treatment. But that particular virtue of arbitration, comes with little grace from Petitioner. After considerable evasion and delay on his part, he was only brought to book on the wage claims of his employees by the use of Alabama's long arm statute in a suit at law. The Union had until then tried in vain to get him before an arbitrator on the claim for wages earned and due.

Whatever the state of the law elsewhere, federal law is clear: The court decides initially that a contractual duty to arbitrate exists under a collective bargaining contract.

That has been done here.

The writ should be denied.

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Certificate of Service

I hereby certify that three copies of the foregoing Brief have been served upon counsel for petitioner, by mailing, postage prepaid, this 22nd day of July, 1974, to:

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1909

NORMAN ALPIN, *Petitioner*

v.

INTERNATIONAL LADIES GARMENT WORKERS UNION, AFL-CIO, *Respondent.*

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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RESTATEMENT OF THE CASE

In his Answer before the District Court, petitioner set out the arbitration procedure of the collective bargaining agreement, pointing out those provisions of the paragraph which stated that arbitration shall be the *exclusive* remedy and tribunal for all disputes. There was absolutely no obligation for petitioner to raise the issue of fraud in the inducement. His Answer said in effect "let's do what we have previously agreed upon

and abitrate". It bears repeating that commencement of the action in the District Court by the union was violative of its own agreement.

Additionally petitioner is compelled to point out that the Brief in Opposition erroneously refers to the Union members as employees of Petitioner Norman Alfin, when, indeed, they were employed by Ashland Industries. Alfin was a shareholder and officer of Ashland and he signed the agreement as an officer and as an individual guarantor, however, he employed no one.

REASONS FOR GRANTING THE WRIT

Respondent's reliance on *John Wiley & Sons* v. *Livingston,* 376 U.S. 543, 84 S.Ct. 909 (1964) and *Atkinson* v. *Sinclair Refining, Inc.* 370 U.S. 238, 82 S.Ct. 1318 to support its position is miscast. In those cases one of the parties was resisting arbitration. In the present matter both parties sought arbitration. The Union requested the stay in the District Court. It was only after it had Professor Murphy's decision that the Union sought a return to the District Court.

Respondent's Brief (p. 4) suggests only one issue was "referred" to the arbitrator and further (p. 6) it states "The arbitrator's jurisdiction under the district court's referral order was confined to determining liability under the terms and provisions of a valid collective bargaining contract". When the matter was submitted to the arbitrator no limits were placed on his authority. His job was to resolve the whole dispute.

Finally a misstatement in the Brief in Opposition (p. 6) should be corrected. The union never tried, prior to commencing the action, to institute arbitration.

If it had, all it needed to do was call upon the Federal Mediation and Conciliation Service to appoint an arbitrator pursuant to the contract.

Respectfully submitted,

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